Supreme Court, U.S.
FILED

961508 MAR 1 1 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-

MICHELLE PRICKETT, BOBBY PRICKETT, AND RITA ROBERTSON, as Administrators of the Estate of Jeffrey Prickett, deceased,
Petitioners,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

PETITION FOR A WRIT OF CERTIORARI

LEILA H. WATSON
CORY, WATSON, CROWDER & PETWAY, P.C.
P.O. Box 55927
Birmingham, AL 35255-5927
205-328-2200
Counsel of record for Petitioners

March 10, 1997

41 pp

QUESTIONS PRESENTED

I. Is there jurisdiction to review this "no opinion" decision of the Supreme Court of Alabama?

II. Is the purpose and intent of the Federal Railroad Safety Act and the 1973 Amendment to the Federal Highway Safety Act, to improve grade crossing safety, advanced when state tort claims of inadequate crossing protection are preempted under 45 U.S.C. § 434 when the evidence is that federal aid projects at the crossing are either 1) started but not completed or, 2) did not include signals and gates when circumstances at the crossing demanded such equipment?

III. Is the purpose and intent of the Federal Railroad Safety Act and the 1973 Amendment to the Federal

Highway Safety Act, to improve grade crossing safety, advanced when state tort claims of excessive train speeds are preempted under 45 U.S.C. § 434 at crossings determined to require signals and gates, during the time between identification of the need for the additional equipment and installation of the additional equipment?

LIST OF PARTIES

All parties to the proceeding are listed in the caption to the petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i-ii
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	v-vii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	viii-x
STATEMENT OF THE CASE	3
1. The Accident	3
2. The Proceedings below	4
3. The governing regulatory scheme	8
4. The DeArmanville crossing	10
REASONS THE WRIT SHOULD ISSUE	13
CONCLUSION	30

TABLE OF AUTHORITIES

CASES	Page
Arizona v. Evans, 115 S. Ct. 1185 (1995)	16
Armijo v. Atchison, Topeka & Santa Fe Ry., 19 F. 3d 547 (10th Cir. 1994)	5
Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993)	passim
Cornell Steamboat Co. v. Phoenix Construction Co., 233 U.S. 593 (1914)	19
CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993)	passim
Earwood v. Norfolk Southern Railway Co., 845 F. Supp. 880 (N.D. Ga. 1993)	30
Hamlin v. Norfolk Southern Ry., No. 1931221 (Ala. 7/12/96)	8
Hamlin v. Norfolk Southern Ry., No. 96-1332 (filed 2/20/97)	passim
Hester v. CSX Transp., 61 F. 3d 382 (5th Cir. 1995), cert. denied, 116 S.Ct. 815 (1996)	22

TABLE OF AUTHORITIES CONTINUED

	Page
Michael v. Norfolk Southern Railway Co., 74 F. 3d 271 (11th Cir. 1996)	22
Michigan v. Long, 463 U.S. 1032 (1983)	14
Prickett v. Norfolk Southern Railway, No. 1940479 (Ala. 10/11/96)	2
Shots v. CSX Transp., Inc., 38 F. 3d 304 (7th Cir. 1994)	23
St. Louis Southwestern Railway Co. v. Malone Freight Lines, 39 F. 3d 864 (8th Cir. 1994), cert. denied, 115 S. Ct. 1963 (1995)	22
Thiele v. Norfolk & Western Railway Company, 68 F. 3d 179 (7th Cir. 1995)	22
STATUTES AND LEGISLATIVE MATERIALS	
23 C.F.R. § 646.214(b)	passim
23 C.F.R. § 646.214(b)(3)	passim
23 C.F.R. § 646.214(b)(4)	24
23 U.S.C. § 130	8
23 U.S.C. § 130(d)	9

TABLE OF AUTHORITIES CONTINUED

	Page
28 U.S.C. § 1257(a)	2
45 U.S.C. § 421, et seq.	8
45 U.S.C. § 433(a)	17
45 U.S.C. § 434	passim
Highway-Rail Crossing Accident/Incident, and Inventory Bulletin No. 15 (1992) Tables 33, 37	16

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 45 U.S.C. § 434, currently codified at 49 U.S.C. § 20106:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

2. 23 C.F.R. § 646.214(b), promulgated by the Secretary of Transportation pursuant to the authority given under the Federal Highway Safety

Act of 1973, 87 Stat. 282, 23 U.S.C. § 130:

(b) Grade Crossing Improvements.

(1) All traffic control devices proposed shall comply with the latest edition of the Manual of Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.

(2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA [Federal Highway Administration] until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-

MICHELLE PRICKETT, BOBBY PRICKETT, AND RITA ROBERTSON, as Administrators of the Estate of Jeffery Prickett, deceased,
Petitioners,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama entered in this case.

OPINIONS BELOW

The decision of the Supreme Court of Alabama was entered on October 11, 1996, and is not reported yet, and is included in the Appendix at 1-3. Prickett v. Norfolk Southern Railway, No. 1940479 (Ala. 10/11/96). The opinion of the Circuit Court of Calhoun County, Alabama, granting summary judgment in favor of Respondents, is not reported and is included in the Appendix at 4-22.

STATEMENT OF JURISDICTION

The Supreme Court of Alabama affirmed the trial court's judgment on October 11, 1996. App. 1-2. The order denying Petitioners' timely application for rehearing was entered on December 13, 1996. App. 3. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

STATEMENT OF THE CASE

1. The accident.

Jeffery Prickett was killed on December 28, 1992, when his pickup truck was struck by a Norfolk Southern train operated by engineer David Stephens at the DeArmanville crossing in Calhoun County, Alabama. The crossing was protected only with crossbuck signs and stop signs, and "R X R" pavement markings. The highway approaches the crossing at an acute angle until just immmediately before the crossing when it turns sharply to the right and intersects the crossing at about ninety degrees.

The accident train approached the crossing from behind Mr. Prickett's right shoulder at a speed of 44 m.p.h. Mr. Prickett followed a white truck over the crossing. Engineer Stephens saw the trucks when the train was about 500 feet

from the crossing. Mr. Prickett appeared to be going about 15 m.p.h and slowing to stop. When Engineer Stephens realized that Mr. Prickett apparently had not seen the train and was not stopping, the train was only about 50 feet from the crossing. The train struck the truck on the passenger side. (Petitioners' Application for additional facts to the Supreme Court of Alabama, App. 66-74.)

Witnesses in the immediate vicinity of the crossing said they did not hear the train blow its whistle on this occasion. (App. 9; 69)

2. The proceedings below.

Petitioners filed this wrongful death action against Respondents in the Circuit Court of Calhoun County, Alabama, alleging that the Respondents had maintained an unsafe crossing that did not have flashing signals and gates, and

that Respondents operated the train at an excessive speed and failed to blow the whistle to warn of the train's approach to the crossing.

Respondents filed a motion for summary judgment on all counts. The circuit court granted the summary judgment concluding:

> that federal funds participated in the installation of warning devices at the crossing ... with the approval of the Federal Highway Administration prior to the accident in question, and that the defendants are entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. App. 18.

The circuit court cited as support for its preemption decision, Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993); Armijo v. Atchison, Topeka & Santa Fe Ry., 19 F. 3d 547 (10th Cir. 1994); CSX Transp., Inc. v. Easterwood,

507 U.S. 658 (1993). App. 19.

The circuit court further held that the claim of excessive speed was preempted by federal law, 45 U.S.C. § 434, App. 8, and that Mr. Prickett was contributorily negligent in failing to stop at the stop sign at the crossing. App. 8-10.

Petitioners appealed to the Supreme Court of Alabama arguing that: 1) This wrongful death claim alleging the railroad's failure to maintain a safe crossing is not preempted under 45 U.S.C. § 434 when the railroad has used federal funds to work on the crossing, but has failed to meet the requirements of 23 C.F.R. § 646.214(b), the regulations created by the Secretary of Transportation to establish the guidelines for federal aid projects, App. 29-53, 2) the claim that the train was

being operated at an excessive speed is not preempted under 45 U.S.C. § 434, when the accident occurs after a determination has been made that a crossing requires signals and gates under 23 C.F.R. § 646.214(b), but before the actual installation of the signals and gates, App. 53-56, and 3) Mr. Prickett's failure to stop at the stop sign was not the proximate cause of his death, App. 57-64.

The Supreme Court of Alabama affirmed without opinion, App. 1-2, and cited as support for its affirmance the Borden, 843 F. Supp. 1410, and Easterwood decisions. App. 3.

Petitioners made application for rehearing and additional facts before the Supreme Court of Alabama, App. 66-74, pointing out that the court's decision on preemption could not be reconciled with Easterwood and its progeny, nor the

Alabama court's earlier decision in Hamlin v. Norfolk Southern Ry., No. 1931221 (Ala. 7/12/96), which is now pending before this Court on the Norfolk Southern's Petition for writ of certiorari to the Supreme Court of Alabama to review this same issue. Hamlin v. Nofolk Southern Ry., No. 96-1332 (filed 2/20/97).

3. The governing regulatory scheme

In 1970, Congress enacted the Federal Railroad Safety Act, 45 U.S.C. §§ 421, et seq, intending that grade crossings would be improved to a national standard, and preempting all state regulation to the contrary. 45 U.S.C. § 434. Towards this end, a program was established by the Federal Highway Safety Act, codified at 23 U.S.C. § 130, to provide funds to the individual states to improve their crossings conditional upon

the states surveying their crossings, identifying those crossings in need of protective devices, and implementing a schedule of projects to accomplish the same. 23 U.S.C. § 130(d). Regulations were promulgated by the Secretary dictating the type of warning devices to be installed with federal funds received under the Act. 23 C.F.R. § 646.214(b). For example, if a crossing has "multiple tracks," "continuing accident occurrences," or "unusually restricted sight distance," or any of the other features listed in 23 C.F.R. § 646.214(b)(3), then any federal aid project at that crossing must include installation of automatic signals and gates, unless a diagnostic survey justifies their absence.

When considering whether the Highway Safety Act has preempted a state law, the

courts must consider whether a federal aid project to improve the crossing was completed in compliance with the Act and regulations. For example, if 23 C.F.R. § 646.216(b)(3) requires that a federal aid project include installation of signals and gates because of the particular crossing features, and gates and signals are not installed, then there has been no compliance with the Act, and a state claim is not preempted. See Easterwood, 507 U.S. at 660, 670. However, if a crossing is the subject of a federal aid project and the protection devices required by 23 C.F.R. § 646.216(b)(3) are installed, a state law claim that the crossing protection was inadequate will be preempted.

4. The DeArmanville crossing

In 1978, a federal aid project was done to install warning signs and "R X R"

pavement markings at the DeArmanville crossing. Although the crossing had "multiple tracks" and an "unusually restricted sight distance" created by the angle of the highway to the crossing, which are special crossing features that mandate installation of signals and gates under 23 C.F.R. § 646.214(b)(3), no signals and gates were installed and no diagnostic study excused their absence. App. 15-18; 71-73.

Between 1978 and 1988, five motor vehicle-train collisions were reported at this crossing. App. 69.

A diagnostic review was performed at this crossing in 1988, which concluded that the DeArmanville crossing required signals, gates, bells, motion predictors, chevron signs and tree cutting. App. 72. The authorization for this project was signed by the Highway Administration on

December 29, 1992, one day after Mr. Prickett's accident, and claimed to be effective back to Octrober 27, 1992. App. 72. The project was actually completed and the signals and gates fully functional in April 1993. App. 73.

From 1988 through December 29, 1992, nine more motor vehicle-train collisions were reported at the DeArmanville crossing. App. 69.

Respondent railroad has argued throughout this case that since 1978, when federal funds were first used to install signs and pavement markings at the crossing, that the crossing has been in compliance with the Act, and all state law governing the crossing since then is preempted. Respondent has maintained this position even though in 1988, a diagnostic review concluded that the crossing required signals and gates.

Petitioners have maintained that there can be no federal preemption unless federal funds are used in compliance with the Federal Highway Act and the regulations promulgated thereunder establishing the guidelines for use of the funds.

REASONS THE WRIT SHOULD ISSUE

1. No independent state ground.

The Supreme Court of Alabama obviously considered and affirmed the circuit court's summary judgment that the Petitioners' claim of wrongful death due to inadequate crossing protection and excessive train speed was preempted under 45 U.S.C. § 434, as evidenced by its citation to Easterwood and Borden, 843 F. Supp. 1410. App. 1. The Easterwood decision is, of course, the lead decision when discussing federal preemption of state claims of inadequate grade crossing

protection and excessive train speeds. Borden is an opinion from an Alabama district court addressing the issues of federal preemption under 45 U.S.C. § 434 and contributory negligence in an Alabama wrongful death action arising from a grade crossing accident. Borden was cited by the circuit court as support for its decision that Petitioners' claims were preempted by section 434, App. 19.

In Michigan v. Long, 463 U.S. 1032 (1983), this Court held that:

> when...a state court decision fairly appears to rest primarily upon federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in

> its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id., at 1040-41. Of course, the Supreme Court of Alabama made no clear and express statement that its decision was based on a "separate, adequate, and independent grounds." Id. at 1041.

This Court may perceive that the Alabama court's decision is unclear whether there is an independent state ground, but that alone should not prevent this Court from taking jurisdiction.

> [A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal consitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases....For no other course assures that important federal issues...will reach this Court for ajudication; that state courts will not be the final arbiters of important federal issues

under the federal constitution. Arizona v. Evans, 115,S. Ct. 1185, 1190 (1995), citing Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940).

Federal preemption is an "important federal issue" that this Court should review. Id. There are 170,000 public grade crossings in the United States, and as of 1992, only 70,000 are protected by automatic signals. U.S. Dept. of Transp., Federal Railroad Admin., Office of Safety, Highway-Rail Crossing Accident/Incident, and Inventory Bulletin No. 15, (1992) Tables 33, 37. The other 100,000 crossings have only stop signs or crossbucks. Many states implemented federal aid programs in the late 1970's and early 1980's to install crossbuck signs and pavement markings at all grade crossings in their state, regardless of whether the crossings had any of the

special hazards identified in 23 C.F.R. § 646.214(b)(3). To allow the railroads to claim federal preemption under these circumstances retards, not advances, the purpose of the Federal Railroad Safety Act and the Highway Safety Act to achieve national uniformity in grade crossing safety. Not all grade crossings are the same, and consequently, not all grade crossings require the same protection. Congress and the Secretary understood this simple idea. Perhaps because of the study performed by the Secretary at the direction of Congress in 1972, 45 U.S.C. § 433(a), specific crossing features were identified by the Secretary as being indicia of a hazardous crossing. Those features were incorporated into 23 C.F.R. § 646.214(b)(3), and if they are present at a crossing, it has been determined that signals and gates are required to

reduce the hazard. The only exception to this are those crossings where a diagnostic team has evaluated the crossing and concluded that the additional warnings are not necessary. The Supreme Court of Alabama did not promote Congress' goal of increasing crossing safety when it held in effect that the expenditure of federal funds for signs and paint at all crossings in Alabama, including the DeArmanville crossing, without regard for the particular hazards of individual crossings, was determined by the Secretary to improve grade crossing safety at those crossings.

The issue of the proximate cause of the accident is "interwoven with the federal law" issue of whether Petitioners can maintain their claim that the death of Mr. Prickett was due to inadequate

crossing protections. The defense that Mr. Prickett's negligence caused his own death is directly related to whether this crossing had any of the hazardous features which required installation of signals and gates to make the crossing safe. If the hazard posed by the crossing could be alleviated by driver action alone, it would not need signals and gates.

This confluence of claim and defense is similar to that addressed by the Court in Cornell Steamboat Co. v. Phoenix Construction Co., 233 U.S. 593 (1914), in which a steamboat company sued a construction company for damages caused when the steamboat's barges struck the construction barges anchored in the Hudson River to perform work in the river bed itself. The steamboat company claimed that the construction barges were

an unlawful obstruction in the channel. The construction company alleged that the steamboat had been negligently operated. The appellate court held that the construction company had federal authority to anchor barges in the river bed and to perform work from the barges, and further, that the steamboat company had negligently operated its boats to strike the construction barges. Id. at 598. This Court, in holding that it had jurisdiction to consider the federal question, said:

> Because the elements involved in the decision of this Federal question are intermingled with the elements necessary to be considered to determine whether there was negligence irrespective of the Federal right affords no reason for not considering and disposing of the issue which the case presents from the Federal aspect, or to treat it as nonexisting. It is indeed true that the fact of negligence, in and of itself,...may be a state question,....But when negligence involves and concerns a subject of

> Federal jurisdiction which it is our duty to decide, to the extent necessary to enable us to discharge that duty, we must consider and review the subject independent of the action of the state court.

Id. at 599.

This Court should also consider that the Respondent railroad in this case, has filed a Petition for writ of certiorari to the Supreme Court of Alabama asking this Court to review the same federal preemption issue raised here by Petitioners. Hamlin v. Norfolk Southern Railway Co., No. 96-1332 (filed 2/27/97). The underlying facts in Hamlin relating to that accident and the crossing history and its condition on the date of that accident, cannot be distinguished from the facts of this case. Essentially, Respondent railroad and Petitioners are in agreement that federal preemption under 45 U.S.C. § 434 is an important

federal question which needs further review by this Court.

2. Federal preemption of state claims of inadequate crossing protection.

The decision of the Supreme Court of Alabama is in conflict with 45 U.S.C. § 434 and the stated intent of the Federal Railway Safety Act and the 1973 Amendment to the Federal Highway Safety Act. It cannot be reconciled with this Court's decision in Easterwood, 507 U.S. 368, and the decisions of several circuits interpreting § 434. Michael v. Norfolk Southern Railway Co., 74 F. 3d 271 (11th Cir. 1996); Thiele v. Norfolk & Western Railway Company, 68 F. 3d 179, 182 (7th Cir. 1995); Hester v. CSX Transp., 61 F. 3d 382, 386 n.6 (5th Cir. 1995), cert. denied, 116 S. Ct. 815 (1996); St. Louis Southwestern Railway Co. v. Malone Freight Lines, 39 F. 3d 864 (8th Cir.

1994), cert. denied, 115 S. Ct. 1963 (1995); Shots v. CSX Transp., Inc., 38 F. 3d 304 (7th Cir. 1994).

Easterwood clearly held that there is federal preemption of state law tort claims of inadequate crossing protection if the following conditions are met:

1.a. At crossings with any of the hazardous features listed in 23 C.F.R. § 646.214(b)(3), any federal aid improvement project must include installation of automatic signals and gates. Easterwood, 507 U.S. at 666.

b. At crossings with (b)(3) features, if signals and gates are not installed as part of a federal aid project, there must be a diagnostic team excusing the absence. Id.

2. At crossings which do not contain any (b)(3) features, approval by the

Secretary of the type of warning used, must be shown for preemption. Id. at 667; 23 C.F.R. § 646.214(b)(4).

3. Federal funds must be used to pay for the improvement project.

All the circuit decisions listed above, and Easterwood, have held that this analysis is proper. First, look to see if the crossing is a (b)(3) crossing. If it has features of subsection (b)(3), there will be preemption only when the federal improvement projects at the crossing included installation of signals and gates, unless a diagnostic team has determined they are not needed. If there are no (b)(3) features, then there will be preemption only if the FHWA Secretary approved the type of warning devices installed. This is the only analysis which continues to promote Congress's

original intent to increase grade crossing safety at all crossings in this country.

The DeArmanville crossing has "multiple tracks," "unusually restricted sight distance" caused by the angle of approach to the crossing, and "continuing accident occurences." 23 C.F.R. § 646.214(b)(3). None of the federal improvement projects completed prior to Mr. Prickett's accident involved the installation of automatic signals and gates, and there was no diagnostic survey excusing their absence. To have held that there is preemption on the basis of any of these federal aid projects cannot be reconciled with the decisions listed above, or with the Acts themselves.

Respondent railroad has continually argued that the expenditure of federal funds for pre-installation engineering or

actual installation, is sufficient to qualify for federal preemption, and has cited Easterwood as support for this claim. However, this Court held in Easterwood that there was no preemption because the facts did "not establish that federal funds participated in the installation of the warning devices at Cook Sreet." Easterwood, 507 U.S. at 672. In fact, there had been an expenditure of federal funds for pre-installation engineering costs on the Cook Street project. In effect, Easterwood held that the mere expenditure of funds for engineering, without expenditure of funds for actual construction, is not sufficient to support federal preemption under the statute.

It is in keeping with the intent of Congress that expenditure for actual

construction of the required devices is necessary before there can be preemption. It is not the expenditure of the first dollar, or the approval by the Secretary for the project which triggers preemption.

> The view that preemption runs from the time of federal approval is inconsistent with the FRSA's goal of promoting safety at railroad crossings....The Railway's interpretation that federal approval triggers preemption would leave the public unprotected between the time of approval and the time the prescribed devices are installed and operating. This can be a substantial amount of time....To encourage prompt installation of federally funded prescribed warning devices, a railroad's common-law duty of care must continue until those devices are installed.

Malone Freight, 39 F. 3d at 867.

> Moreover, adopting the rule [the railway] proposes would mean that for projects where the federal government approved warning devices or prescribed them for a particular crossing, but for some reason the project was never completed (e.g. lack of funding...), the public would be unprotected indefinitely,

> even though nothing had actually changed at the crossing.

Thiele, 68 F. 3d at 184.

The Supreme Court of Alabama's decision cannot be reconciled with the acts governing crossing safety or the decisions under them. However, the more important reason for granting this Petition is that questions remain after Easterwood regarding federal preemption under 45 U.S.C. § 434. Can preemption be based upon the mere expenditure of federal funds to improve a crossing? Is approval by the Secretary implied by the expenditure of federal funds? Is it sufficient that federal funds are spent for pre-installation engineering, or must the construction of the required devices be complete before a state claim will be preempted? Can there be preemption of a state claim involving a (b)(3) type

crossing if the Secretary approves the project without signals and gates, even in the absence of a diagnostic review?

These questions have been raised by counsel for highway users, railroads, and courts, and the answers have been nearly as numerous as the questions. See, e.g., the Petition filed by Respondent in Hamlin v. Norfolk Southern, No. 96-1332.

3. Federal preemption of state negligence claims of excessive speed.

Section 434, Title 45, contains a savings clause which states:

> a State may adopt...a more stringent...standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard."

Petitioners only contention on this claim is that after a diagnostic team has concluded that a crossing requires signals and gates, that crossing is a "local safety hazard" known to the

railroad, and until the signals and gates are actually installed, the railroad should be obligated to modify its operations at that identified crossing. Until gates and signals are actually installed, the public is protected only by the railroad's exercise of due care at the crossing. Earwood v. Norfolk Southern Railway Co., 845 F. Supp. 880, 886-87 (N.D. Ga. 1993). A claim that the railroad failed to modify is operation, and reduce its speed at this crossing pending the construction of the devices, should not be preempted under section 434.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Leila H. Watson
Counsel For Petitioners

Supreme Court, U.S.
FILED

961508 MAR 11 1997

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No. 96-

MICHELLE PRICKETT, BOBBY PRICKETT, AND RITA ROBERTSON, as Administrators of the Estate of Jeffery Prickett, deceased,
Petitioners,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

LEILA H. WATSON
CORY, WATSON, CROWDER & PETWAY, P.C.
P.O. Box 55927
Birmingham, AL 35255-5927
205-328-2200
Counsel of record for Petitioners

March 10, 1997

RECEIVED
MAR 11 1997
OFFICE OF THE CLERK
SUPREME COURT, U.S.

77pp

TABLE OF CONTENTS

	Page
SUPREME COURT OF ALABAMA AFFIRMANCE 10/11/96.....	1
SUPREME COURT OF ALABAMA DENIAL OF APPLICATION FOR REHEARING.....	3
CIRCUIT COURT OF CALHOUN COUNTY ORDER.....	4
PETITIONER'S BRIEF (EXCERPTS) TO SUPREME COURT OF ALABAMA	24
PETITIONER'S REQUEST FOR ADDITIONAL FACTS TO SUPREME COURT OF ALABAMA	67

APPENDIX A

OCTOBER 11, 1996

SUPREME COURT OF ALABAMA

STATE OF ALABAMA - - JUDICIAL DEPARTMENT
OCTOBER TERM, 1996-97

Case No.: 1940479

Michelle Prickett, et al

v.

Norfolk Southern Railway Company and David W. Stephens
(Calhoun: CV-93-083)

COOK, JUSTICE.

AFFIRMED. NO OPINION.

See Rule 53(a)(1) and (a)(2)(E), Ala. R. App. P., and CSX Transp., Inc. v. Easterwood, 507 U.S. ____, 113 S. Ct. 1732, 123 L. Ed 387 (1993); and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Hooper, C.J., and Maddox, Almon, Shores, Houston, Kennedy, and Butts, JJ., concur.

APPENDIX B

IN THE SUPREME COURT OF ALABAMA

December 13, 1996

1940479

Michelle Prickett, et al.

v.

Norfolk Southern Railway Company and
David W. Stephens
(Calhoun: CV-93-083)

Notice

The application for rehearing filed in this cause is overruled. No opinion written on rehearing.

Cook, J. - Hooper, CJ., Maddox, Almon, Shores, Houston and Kennedy, JJ., concur.

APPENDIX C

IN THE CIRCUIT COURT
OF CALHOUN COUNTY, ALABAMA

Case No. CV 93-083

Michelle Prickett, Bobby Prickett, and Rita Robertson as personal representatives of the Estate of Jeffrey Remarth Prickett, deceased, and individually,

Plaintiffs

Norfolk Southern Railway Company; David M. Stephens, et al.,

Defendants

ORDER AND JUDGMENT

The defendants, Norfolk Southern Railway Company and its engineer, David W. Stephens, timely filed a Motion for Summary Judgment on August 15, 1994, and an accompanying Memorandum on August 18, 1994. A hearing on defendants' Motion for Summary Judgment was held on September 2, 1994. At that hearing,

plaintiffs' attorney requested additional time in which to obtain evidence and to file a brief in response to the defendants' Motion for Summary Judgment. The Court granted plaintiffs up to ten days from the date of the hearing in which to file a brief and thirty days from the date of the hearing in which to submit evidence in opposition to defendants' Motion for Summary Judgment. Plaintiffs subsequently requested a couple of extra days in which to submit a brief. Plaintiffs submitted a brief to the Court on September 16, 1994. The deadline for submitting additional evidence was October 3, 1994. Plaintiffs requested and received additional time in which to take depositions and complete additional discovery. The new deadline was October 28, 1994.

In the additional time for discovery

granted by the Court, plaintiffs took the depositions of Kenneth L. Joiner, Michael L. Shaw, Cecil W. Colson, Jr., Dykes T. Rushing, and E.H. Bentley. The complete transcripts of all five depositions have been filed and considered by the Court.

The Court has given a full and complete examination of all matters raised at the hearing on September 2, 1994, as well as all matters pertinent to and submitted in support of or in opposition to defendants' Motion for Summary Judgment, either before or since the hearing. These essential facts regarding the accident are uncontroverted. The accident occurred at approximately 11:30 a.m., December 28, 1992, at the intersection of DeArmanville Road (County Road 45) and the Norfolk Southern Railway Company Main line in Calhoun County, Alabama The pickup truck

driven by plaintiffs' decedent was southbound and the train was eastbound. There were two standard crossbuck signs, one on each side of the track, and two red and white octagonal "STOP" signs, one on each side of the tracks, at the crossing at the time of the accident. Before reaching the tracks, the Prickett vehicle passed a stop ahead sign, a railroad advance warning sign, and R X R pavement markings. The Prickett vehicle did not stop for the stop sign at the crossing, but instead pulled onto the track without stopping just as the train reached the crossing. The engineer put the train into emergency to stop the train. The train, which was traveling about 40 to 45 mph at the time of the incident, was within the maximum speed of 60 mph permitted by federal regulations.

At the conclusion of that hearing,

based on the undisputed evidence before it, the Court granted the defendants' Motion for Summary Judgment with respect to any claim predicated on negligence or wantonness as to the speed at which the train involved in the accident was operating. This claim is preempted by federal law. The Court also granted defendants' Motion for Summary Judgment as to any claims for compensatory damages arising out of the death of plaintiffs' decedent, as Alabama law does not permit any recovery for compensatory damages in a wrongful death action.

The issues of whether to grant defendants' Motion for Summary Judgment based on plaintiffs' decedent's failing to stop in obedience to the stop sign at the crossing and as to any claim of negligence or wantonness predicated on the adequacy of the traffic control

devices present at the crossing on the date in question was taken under advisement at the conclusion of the hearing on September 2. The plaintiffs submitted a brief in opposition to defendants' Motion for Summary Judgment, and five depositions have now been submitted.

The plaintiffs submitted the affidavits of Nora Fagan and Curtis E. Hill for the purpose of disputing whether the train horn was properly sounded prior to the accident. However, the plaintiffs have not submitted any evidence controverting testimony submitted by defendants that plaintiffs' decedent never stopped for the stop sign at the crossing. Whether the horn was sounded properly is immaterial and irrelevant on this issue. As plaintiffs' decedent was under an obligation under Alabama law to

stop, look and listen in obedience to the stop sign at the crossing, and the undisputed evidence is that he failed to do so, defendants' Motion for Summary Judgment is granted on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question. Middaugh v. City of Montgomery, 621 So. 2d 275 (Ala. 1993), and Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993).

Based on the photographs presented to the Court, no reasonable juror could find that Prickett would not have been able to detect the approach of the train had he stopped at an appropriate place before attempting to traverse the crossing. Moreover, it is clear that if plaintiff's decedent had looked for a train at a place where he needed to look, there is

nothing which would have kept him from seeing the approaching train. If it is assumed that plaintiffs' decedent did look, he is held to have seen that which was there to be seen.

In the alternative, the Court has also considered the defendants' Motion for Summary Judgment with respect to any claim of negligence or wantonness predicated on the adequacy of the traffic control devices present at the crossing on the date in question. In the opinion of the Court, the evidence is uncontroverted on this issue, and defendants' Motion for Summary Judgment is now granted as to this claim.

In support of their Motion for Summary Judgment, the defendants presented the affidavits of Dykes T. Rushing, E.H. Bentley, Cecil W. Colson, Jr., Kenneth L. Joiner (two affidavits), Michael L. Shaw,

A.T. Hanak, and J.P. Thomas, along with excerpts from the depositions of David W. Stephens (a defendant and the engineer on the train), Johnny Louis Bell (conductor on the train), and Willie L. Bennett (trainman on the train).

In opposition to defendants' Motion for Summary Judgment with respect to the adequacy of the warning devices at the crossing, plaintiffs submitted the depositions of Kenneth L. Joiner, Michael L. Shaw, Cecil W. Colson, Jr., Dykes T. Rushing, and E.H. Bentley.

Rushing is Office Engineer for the Alabama Department of Transportation and is responsible for the oversight of the Alabama State Department of Transportation records of federal aid projects. He is the custodian of those records. Rushing's affidavit and deposition established that there have

been a total of three federal projects at the DeArmanville Road crossing, all of which received the approval and authorization of the Federal Highway Administration prior to the date of the accident in question. He testified that the DeArmanville Road crossing at issue in this case first involved participation (including approval and authorization of the project) by the Federal Highway Administration and utilized federal funds for the improvement of that crossing by the installation of warning devices in 1978 and 1979. A total of $184,680.00 in federal funds was obligated for the installation of warning devices at crossings in that project. He also testified that a second federal project to install warning devices at the crossing involved participation (including approval and authorization of

the project) by the Federal Highway Administration in the installation of warning devices at the crossing. This project involved the obligation of federal funds prior to the accident in the amount of $48,870.00 for the installation of warning devices at crossings, including the DeArmanville Road crossing. Finally, Rushing testified that a third project involving participation (including approval and authorization of the project) by the Federal Highway Administration utilized federal funds for the improvement of the crossing at issue in this case by the installation of active warning devices. The final approval of the Federal Highway Administration for this project, which included installing signals, gates, bell, motion predictor, extra set of signal heads, and chevron sign, and cutting

trees on the west approach to the crossing, was given on October 27, 1992, prior to the accident in question. This project was placed in service on April 26, 1993.

The affidavit deposition of Mr. E.H. Bentley established that companies owned by him held the contracts to perform the work of installing the warning devices at the DeArmanville Road crossing called for by the first Federal Aid Project authenticated by Mr. Rushing's affidavit and that that work was performed and was complete by July 1979, and that federal funds paid for the construction.

The affidavits and deposition of Mr. Kenneth L. Joiner authenticated Federal Aid Rail Highway Crossing Project Agreements and other pertinent documents incident to the same projects covered in Mr. Rushing's affidavit and established

that Calhoun County agreed to maintain the warning devices after installation (except for the maintenance of the flashing lights and gates).

Cecil W. Colson, Jr., is Assistant Multimodal Transportation Engineer for the State of Alabama Department of Transportation. Colson testified that prior to the accident in question, a diagnostic review team comprised of representatives of the State of Alabama Department of Transportation, the railroad, and Calhoun County had evaluated the crossing to determine whether additional signs or signals should be installed. Federal funds paid for the time and expenses of the State Department of Transportation personnel who participated in the diagnostic review. A series of steps followed the diagnostic review and involved the

significant participation of both the State Department of Transportation and the Federal Highway Administration prior to the accident. These steps included, among other things, the preparation of detailed engineering plans for the project. Colson further testified that the Federal Highway Administration gave final approval for the project for the installation of active signals at the crossing on October 27, 1992.

Michael L. Shaw is the County Engineer for Calhoun County. He testified that signs and markings were installed at the crossing with federal funds, that lights and gates were installed at the crossing with federal funds, and that Calhoun County had installed a stop sign, stop ahead sign, pavement markings and stop line at the crossing prior to the accident in question.

A.T. Hanak is the Administrator Grade Crossing Program for Norfolk Southern Corporation and its affiliated and subsidiary railroads, including Norfolk Southern Railway Company. Hanak testified that the railroad received authorization on December 10, 1992, from the State of Alabama Highway Department to proceed with the installation of lights and gates at the crossing. He testified that this project was placed in service on April 26, 1993, and that the costs of the project were paid for with 90% federal funds and 10% local or county funds.

The above described evidence is not disputed.

Based on these undisputed facts, this Court concludes that there is no genuine issue of material fact, that federal funds participated in the installation of

warning devices at the crossing in issue with the approval of the Federal Highway Administration prior to the accident in question, and that the defendants are entitled to a judgment as a matter of law on the plaintiffs' claims seeking to impose liability on the railroad for inadequate warning devices at the crossing. The Court was not presented with any legal authority establishing that under current Alabama law on the facts of this case Norfolk Southern would have had a duty to have had signs or signals at this crossing other or different from those that were present, it being undisputed that standard crossbuck signs and "STOP" signs were in place on both sides of the track at the time of the accident. Nevertheless, assuming without deciding that Alabama law might impose such a duty, this

decision is based on the preemption of such claims on the reasoning set out in and authority of Borden vs. CSX Transportation, 843 F. Supp. 1410 (M.D. Ala. 1993), Armijo vs. Atchison, Topeka & Santa Fe Ry., 19 F. 3d 547 (10th Cir. 1994) and Easterwood vs. CSX Transportation, 507 U.S. ___, 113 S.Ct. 1732, 123 L. Ed. 2d 387 (1993).

Plaintiffs argued that the diagnostic review done after the installation of the passive warning signs and markings under the Federal Aid Projects in 1978 abrogated preemption, or, in the alternative, that preemption did not occur until the actual installation of the flashing lights and gates. There are several answers to this. First, under Easterwood, actual installation is not a requirement. Easterwood requires that federal funds participate in the

installation of either active or passive warning devices with the approval of the Federal Highway Administration in order to establish preemption. The Court finds that this occurred prior to the accident in question with respect to each of the three federal projects mentioned above. Thus, preemption was established at the time of the first project in 1978-79.

Second, preemption arises from the exercise of authority, albeit that the exercise of federal authority is with respect to the first project established by proof of a rather mechanical, but substantively important and complex act, i.e., expenditure of federal funds for the installation of passive warning devices. Once federal authority has occupied the field, this Court can find no authority to support the notion that the authority may diminish, wear out or

disappear with passage of time or change of circumstances.

Third, even if one assumed that preemption could not occur with the installation of passive warning devices, a view which this Court rejects as being contrary to the holding of Easterwood, the participation of the Federal Highway Administration in the project to install active warning devices at the crossing was significant and substantial prior to the accident in question and is a sufficient ground on which to base the doctrine of preemption in this case under the holding of Easterwood.

In accordance with the foregoing, it is hereby ORDERED, ADJUDGED and DECREED by the Court that summary judgment be and the same is hereby entered in favor of the defendants on the claim Of the plaintiffs as to the adequacy of the

signs or signals at the crossing.

It is hereby further ORDERED, ADJUDGED and DECREED that a complete summary judgment is hereby entered in favor of the defendants on all claims of the plaintiffs on the basis that the contributory negligence of the plaintiffs' decedent was the sole proximate cause of the accident and death here in question and that this cause be and the same is hereby dismissed with prejudice. Costs are taxed to the plaintiffs.

DONE and ENTERED this 23rd day of November, 1994.

/s/ Malcolm B. Street, Jr.
Malcolm B. Street, Jr.
Circuit Judge

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

MICHELLE PRICKETT, et al.,
Appellants,

v.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,
Appellees

Case No. 1940479

ON APPEAL FROM THE CIRCUIT COURT
OF CALHOUN COUNTY
CV 93-83

BRIEF OF APPELLANTS

Leila H. Watson
300 North 21st Street
Birmingham, AL 35203
205 328-2200
Appellants' Attorney

ORAL ARGUMENT REQUESTED

[PORTIONS OF APPELLANTS' BRIEF NOT RECOPIED FOR THIS APPENDIX INCLUDE: TABLE OF CONTENTS, TABLE OF AUTHORITIES, STATEMENT OF THE CASE, STATEMENT OF THE FACTS, REQUEST FOR ORAL ARGUMENT.]

ISSUES PRESENTED FOR REVIEW

I. Is the plaintiffs' claim that Norfolk Southern failed to construct and maintain a safe crossing and should have installed signals and gates preempted by federal law?

II. Is the plaintiffs' claim that engineer Stephens was operating the train at an unsafe speed preempted by federal law?

III. Was Jeffrey Prickett's failure to stop contributory negligence that proximately caused this accident?

SUMMARY OF THE ARGUMENT

I. THERE IS NO PREEMPTION OF PLAINTIFFS' STATE LAW CLAIM THAT THE RAILROAD HAS FAILED TO MAINTAIN A SAFE CROSSING.

Preemption of a state law claim occurs when the federal government has chosen to regulate in a defined area to the exclusion of the states in order to attain some national uniformity. In this case, the issue is what will make a grade crossing safe. There will be preemption if the federal government has issued

regulations setting standards for grade crossing safety, and the State has chosen to follow those standards. The Plaintiffs then cannot try to enforce a different standard in their suit. However, the strength of a preemption claim is that the federal regulations have been followed. If the regulations have not been followed, then there can be no preemption.

Title 23, section 646.214, of the Code of Federal Regulations sets out what the federal government has determined will be required protection at certain grade crossings. If the required protection is in place at a grade crossing at the time of an accident, the injured party cannot maintain a suit against the railroad or the State on the grounds that the crossing protection is inadequate. This would destroy the

uniformity of national standards and would override federal decision-making authority. The injured party should not be allowed to maintain suit by claiming, in effect, that the federal standard is not good enough. However, if there is no conformity with the federal regulation, then the regulation cannot be preempting any claim by the injured party. In this case, the Plaintiffs' claims essentially amount to a suit to enforce the federal regulations because they are not claiming that the crossing required any greater protection than that which was required under 23 C.F.R. 646.214.

II. THERE IS NO PREEMPTION OF THE PLAINTIFFS' CLAIM THAT ENGINEER STEPHENS WAS OPERATING THE TRAIN AT AN UNSAFE SPEED.

Before 1989, there was a diagnostic review performed of this crossing in which the railroad was a participant. It

became known to the railroad then that the existing warnings, ie. crossbucks and pavement markings, were inadequate protection and that this crossing required train activated signals and gates to meet federal standards of crossing safety. There had been 13 reported accidents at this crossing before Jeffrey Prickett was killed in December 1992, and before the crossing was brought up to standards. The railroad should not have ignored this knowledge, and should have instituted interim measures until the signals and gates were installed. The railroad should have issued a "slow order" for this crossing and the engineer should have operated at a slower speed to compensate for the inadequate sight distance.

There is a savings clause in the

preemption provision of the Federal Railroad Safety Act, which allows the states to maintain more stringent standards when there are "local safety hazards," such as a crossing that falls below standards. This crossing fell below standards, and all that was required by the railroad as an interim measure to make the crossing safer was reduced speed by the train. This claim is not preempted because it would be an interim measure taken to correct an extremely fatal "local safety hazard."

III. JEFFREY PRICKETT'S FAILURE TO STOP WAS NOT CONTRIBUTORY NEGLIGENCE THAT PROXIMATELY CAUSED HIS DEATH.

Contributory negligence is not a defense to wantonness. There is substantial evidence of wantonness presented by Plaintiffs. Defendants knowingly maintained a very dangerous crossing for a period of years, and on

the date of the accident, the train was operating at a speed that was unreasonable with the present circumstances and failed to sound the train horn.

Additionally, this case, as in most negligence cases, presents a question of fact on matters of contributory negligence and proximate cause. Summary Judgment was inappropriate on these issues.

ARGUMENT

I. PLAINTIFFS' CLAIM THAT DEFENDANTS HAVE MAINTAINED AN UNSAFE CROSSING IS NOT PREEMPTED UNDER 23 C.F.R. 646.214(b)(3) AND CSX TRANSPORTATION V. EASTERWOOD.

A. FEDERAL PREEMPTION: 23 C.F.R. 646.214 (b)(3) AND CSX V. EASTERWOOD

The Federal Railroad Safety Act (hereinafter "FRSA"), codified at 45 U.S.C. 421, et seq., was enacted in 1970

to promote safety in all areas of railroad operations. Of the numerous areas of railroad safety, only one was afforded specific treatment in the FRSA, and that was the area relating to the problem of grade crossing safety, to which a specific section of the Act was devoted. Under 45 U.S.C. 433(a), the Secretary of Transportation was required to study and report to Congress on the problem of protecting grade crossings and to undertake a coordinated effort toward solving the grade crossing problem.

In response to the Secretary's report to Congress on the problems of grade crossings and the possible solutions, Congress amended the Federal Highway Safety Act in 1973. The 1973 Act made federal funds available to the States to improve grade crossings, conditional upon the individual States

conducting and maintaining a survey of all grade crossings, identifying those crossings in need of protective devices, and implementing a schedule of projects to accomplish the same.

To carry out this program with national continuity, the Act authorized the Secretary to promulgate regulations governing the implementation of projects to increase grade crossing safety and installation of warning devices at the crossings involved.

It is these regulations which are at issue here. The FRSA contains an express preemption provision on which the railroads have relied for their argument that the Secretary's regulations preempt the claims of an unsafe crossing. 45 U.S.C. 434. The provision states:

> The Congress declares that laws, rules, regulations, orders and standards relating to railroad

> safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

The issue before this Court now is whether the Secretary's regulations "cover" the Plaintiffs' allegations under Alabama law that the Norfolk Southern failed to maintain the safety of the DeArmanville crossing and should have had signals and/or gates to protect the crossing.

> [T]he issue before the Court is whether the Secretary of Transportation has issued regulations covering the same

> subject matter as [Alabama] negligence law pertaining to the maintenance of, and the operation of trains at, grade crossing. To prevail on the claim that the regulations have preemptive effect, petitioner [railroad] must establish more than that they "touch upon" or "relate to" that subject matter, [cite omitted] for "covering" is a more restrictive term which indicates that preemption will lie only if the federal regulations substantially subsume the subject matter of the relevant state law.

CSX v. Easterwood, 113 S. Ct. at 1738, 123 L. Ed. 2d at 396-97.

23 C.F.R. 646.214(b) is the regulation passed by the Secretary which Defendants, and railroads generally in Easterwood and its progeny, claim preempts state law.

> (b) Grade Crossing Improvements.
>
> (1) All traffic control devices proposed shall comply with the latest edition of the Manual of Uniform Traffic Control Devices for Streets and Highways supplemented to the extent applicable by State standards.
>
> (2) Pursuant to 23 U.S.C. 109(e), where a railroad-highway grade

crossing is located within the limits of or near the terminus of a Federal-aid highway project for construction of a new highway or improvement of the existing roadway, the crossing shall not be opened for unrestricted use by traffic or the project accepted by FHWA until adequate warning devices for the crossing are installed and functioning properly.

(3)(i) Adequate warning devices, under 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school buses or trucks carrying hazardous materials, unusually restricted sight distance,

continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

(ii) In individual cases where a diagnostic team justifies that gates are not appropriate, FHWA may find that the above requirements are not applicable.

(4) For crossings where the requirements of 646.214(b)(3) are not applicable, the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of the FHWA.

This regulation dictates the type of warning device that is required at a grade crossing. The regulation will preempt any state law, including common law negligence, dictating the type of warning device to be required at a crossing, assuming the requirements of the regulation are met.

Subsection (b)(1) is not in issue here as Plaintiffs admit that all the traffic control devices were in

compliance as required under the regulation. Likewise, subsection (b)(2) is not in issue because the crossing was not "at or near the terminus of a Federal-aid highway project." Defendants would agree that subsections (b)(3) and (4) are at the heart of this preemption battle.

Under this regulation, if a crossing features any of the conditions listed in subsection (b)(3), any federally funded improvement project must contain gates and signals, unless a diagnostic survey justifies their absence. At crossings that do not have any of the listed (b)(3) features, the type of warning device to be installed with federal funds must be approved by the Federal Highway Administration. 23 C.F.R. 646.214(b)(4).

> States must employ automatic gates with flashing light signals as part of any improvement project that

> concerns a crossing which features, inter alia, multiple tracks, high speed trains operating in areas of limited visibility, heavy vehicle or train traffic, or if a diagnostic team made up of "representatives of the parties of interest in the crossing" recommends them. [FN omitted] For federally funded installations at crossings that do not present the track conditions specified in section 646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State...agency, and/or the railroad, is subject to the approval of the FHWA." 646.214(b)(4).

CSX v. Easterwood, 113 S. Ct. at 1739, 123 L. Ed. 2d at 398.

See also Heizelman v. Southern Pacific Transportation Company, (USDC Ore. 1993; Copy attached to this brief)("If automatic gates are not appropriate under (b)(3), then a (b)(4) analysis is necessary.).

B. APPLICATION OF THE REGULATION TO THE DEARMANVILLE CROSSING.

The DeArmanville crossing features several of the conditions listed in

subsection (b)(3), and the federally funded projects at the crossing which were completed prior to December 28, 1992, the date of the accident, did not include installation of gates and signals. Consequently, the requirements of the regulation have not been met, and the railroad's reliance on the regulation for preemption of the state law claims, is improper.

The DeArmanville crossing has two main line tracks, or in other words, "multiple main line railroad tracks." 23 C.F.R. 646.214(b)(3)(i)(A). The physical layout of this crossing, particularly when trains approach from the west and highway traffic is traveling south, as was the case in this accident, creates an "unusually restricted sight distance." 23 C.F.R. 646.214(b)(3)(i)(E). Thirteen accidents in the 10 years preceding this

one is sufficient to show "continuing accident occurrences." 23 C.F.R. 646.214(b)(3)(i)(E).

Plaintiffs have presented evidence that the DeArmanville crossing, in 1978/79 and 1991, the dates of Projects 1 and 2, had in existence two or three of the "(b)(3) features." If the railroad wants to rely on the regulation and these two projects to preempt Plaintiffs' claims, they must present evidence that the projects included installation of gates and signals, or that a diagnostic team review justified their absence. This, the railroad has failed to do. Both projects involved only the installation of signs and pavement markings. No signals or gates were installed. There was no diagnostic survey done prior to either project requiring gates and signals or justifying

their absence.

Norfolk Southern, in its Motion for Summary Judgment, relied on a string of decisions that held that the expenditure of federal funds alone is sufficient to invoke preemption under the regulations. The analysis is not that simple; whether federal funds were spent is just the first question that must be answered. The Court must still decide whether the regulation was followed. Were there any (b)(3) features at the crossing? If so, then gates and signals must be installed with the project. If there are no gates or signals at a (b)(3) crossing, was there justification for their absence? This is the analysis that must be made under 23 C.F.R. 646.214 and Easterwood.

> The Secretary was to have the whip hand in specifying safety standards in the railroad industry; the preemption provision itself refers, in a sentence that we did not quote,

> to the goal of achieving so far as possible national uniformity in those standards. So if the Secretary had prescribed cross-bucks for the crossing at which Shots was injured, Shots could not argue that the common law of Indiana required the railroad to install automatic gates and flashing-light signals. The regulation would have covered the subject matter of highway safety at that crossing.

Shots v. CSX Transportation, ___ F. 3d ___ (7th Cir. 1994) [1994 WL 559519].

Although Project 3 did ultimately result in upgrading of the crossing, including installation of signals and gates, it cannot be the basis of application of the regulation because the actual construction of the warnings was not commenced until after this accident, and the equipment was not in service until April 1993. Under CSX v. Easterwood, merely completing a diagnostic survey and engineering diagrams is insufficient.

In Easterwood, the evidence was that

Mr. Easterwood was killed in February 1988, at the Cook Street crossing in Cartersville, Georgia. In 1979/80, the Georgia DOT decided to upgrade the crossings in Cartersville. It installed motion detection devices at five crossings, including the Cook Street crossing. It installed signals and gates at four of these crossings, but not at the Cook Street crossing because Cook Street required the construction of a traffic island, and city approval was required. The city declined to approve the island and the plan for the gate was shelved by the DOT and the funds that had been earmarked for the gates at Cook Street were reallocated for use in a different project. There were no gates at the Cook Street crossing on the date of the accident. The project to place a gate at Cook Street was placed on a list

of projects to be considered at a later time. The railroad claimed that this was a single project to improve the five Cartersville crossings and that federal funds had been actually expended on the project, including work at Cook Street. The Supreme Court held that these facts "do not establish that federal funds 'participated in the installation of the warning devices' at Cook Street." CSX v. Easterwood, 113 S. Ct. at _____, 123 L. Ed. 2d at 401-02.

Under Easterwood, the mere expenditure of funds for engineering costs, without actual expenditure of federal funds for the installation of gates and flashing signals does not meet the requirements of the regulation, and therefore, the regulation does not apply and cannot be relied upon to preempt a state law claim that there should have

been greater protection at a crossing at the time of the accident.

Other courts after Easterwood have reached a similar holding. In Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880, 886 (N.D. Ga. 1993), the Court held that "preemption is triggered when the signals are installed, not when the first federal dollar participates."

> The presence of adequate warning devices and the speed limits protect the public. The devices, not federal funds, provide the protection. Until the devices themselves are installed, the care exercised by the railroads protects the public.

Earwood v. Norfolk Southern, 845 F. Supp. at 886-87. The Tenth Circuit, in Armijo v. Atchison, Topeka and Santa Fe Railway Company, 27 F. 3d 481 (10th Cir. 1994), remanded the case back to the trial court for a determination whether federal funds had participated "significantly" in the

upgrading of the crossing. The court reasoned that "preemption does not occur until federal funds participate in the installation of warning devices." In Armijo, a diagnostic team had recommended installation of flashing signals and gates, but no construction work had commenced before the accident. The Ohio Supreme Court, in Carpenter v. Consolidated Rail, 69 Ohio St. 3d 259, 631 N.E. 2d 607 (1994), held that "before a state law governing warning devices will be preempted, federal funds must actually have been committed, spent...and the devices must have been installed." It is also worthwhile to note that if 23 C.F.R. 646.214(b)(2) were the applicable subsection, there would be no preemption until "adequate warning devices for the crossing are installed and functioning properly."

In the case at bar, the only evidence before the Court is that there was an expenditure of federal funds for engineering plans for a future installation. The payment for the plans came from the "PE or preliminary engineering fund," which is a general state-wide federal fund that is non-specific for any crossing. (C 807) What protection does the public have if the engineering plans had been drafted in 1989, but no gates or signals installed until 1993? Does this give the railroad immunity to pass over this crossing, identified and known to be inadequately protected, with indifference year after year on the basis of years old plans? NO - the answer was given by the Earwood court that until the gates and signals are installed the care exercised by the railroad protects the public, and when

the railroad breaches that responsibility, it is liable in suit.

The Secretary, by 23 C.F.R. 646.214(b)(3), prescribed that the DeArmanville crossing, because it has double main tracks and limited sight distances, should have signals and gates. This was the case in 1978/79 when Project 1 was carried out, it was the case in 1989 when the diagnostic review was performed of this crossing, it was the case in 1991 when Project 2 was signed, and it was the case on December 28, 1992, when Jeffrey Prickett was struck and killed by the Norfolk Southern train. For nearly 15 years, the Secretary's regulations were not carried out. The Plaintiffs' claims should not be preempted because the railroad now comes forward and says "but we had the plans drafted all this time." Plans are not

the same as working signals and gates at the crossing. Plans, never executed, offer no protection to motorists and trains or increased crossing safety.

Norfolk Southern contended in its Motion for Summary Judgment that because federal funds had been expended at this crossing for improvements that met the requirements of 23 C.F.R. 646.214 (b)(1), the Plaintiffs' subsequent claim that the crossing was unsafe is preempted. Plaintiffs submit again that it is not this simple.

Following the 1973 amendment to the Highway Safety Act, the State, using federal funds, "improved" most crossings in Alabama by installing crossbucks and pavement markings. The 1978/79 project was part of this state-wide program. This type of program was carried out across the country as a result of the

amendment. In Shots v. CSX Transportation, __ F. 3d ___ (7th Cir. 1994) [1994 WL 559519], the evidence was that the State of Indiana used federal funds to install crossbucks at nearly 2,700 crossings. Plaintiffs' Counsel just argued a case in Mississippi where the Mississippi DOT explained that in the early 1980s, the State used federal funds to put pavement markings and crossbucks at 2,000 paved crossings in Mississippi. Crossings with multiple tracks, sight obstructions, heavy highway and rail traffic, and high accident histories, received the same treatment as those with single tracks and clear sight distances. This was also the case with Project 1 in which every crossing in the Fourth Division received crossbucks and pavement markings, regardless of the individual features of each crossing. (C 438)

Were it so simple that the mere expenditure of about $900 of federal funds (C 828, 1027-29) for passive warning devices at every crossing in Alabama, Mississippi, Indiana and probably every other crossing in the country, then preemption becomes immunity for the railroad when it has not spent a dime or been responsible for initiating the program. However, the intent of the Act was to make grade crossings safer, not provide immunity for the railroad. The intent of the Secretary's regulations promulgated pursuant to the Act, was that crossings that present greater hazards would receive greater protection, and that this would put those crossings on equal footing with less busy crossings with better sight distances, in terms of grade crossing safety. This intent cannot be carried out if every crossing,

regardless of features, receives only crossbucks and pavement markings. For this Court to hold that the mere expenditure of federal funds for crossbucks and pavement markings preempts the Plaintiffs' claim, requires the Court to ignore application of the Act and regulations. And, if the Act and regulations do not apply to this crossing, then there should be no preemption.

One last point in this argument bears mentioning. Norfolk Southern claims that it is forbidden under Alabama law from erecting at its crossings any more than a crossbuck sign and that therefore, it has no common law duty to provide greater protection at more dangerous crossings. (C 290-92) It cites a criminal statute as support for its claim. This statute was intended to

punish people who erect signs that would create a dangerous condition, like pranksters that would put up increased speed limit signs or detour signs. It could not have been the intent of the Legislature to prevent the railroad from correcting a hazardous condition.

The railroad also cites the Alabama Manual of Uniform Traffic Control Devices, for support that unauthorized signs and signals are prohibited. There is nothing stopping the railroad from doing what many municipalities and counties have had to do, and seek permission from the State Highway Department for authorization to erect signs, or for the Highway Department to do so itself. The railroad cannot have intimate knowledge that one of its crossings is so hazardous and still claim that there was nothing it could do to

change this situation. The railroad can be sued for maintaining such a hazardous crossing and failing to do anything to make it safer. Louisville & Nashville Railroad Company v. Williams, 370 F. 2d 839, 842 (5th Cir. 1966).

II. PLAINTIFFS' CLAIM THAT STEPHENS WAS EXCEEDING A SAFE AND REASONABLE SPEED IS NOT PREEMPTED UNDER THE FEDERAL RAILROAD SAFETY ACT.

The speed limit for this train on December 28, 1992, was 60 mph. The train was actually traveling at about 44 mph at the time of the accident. In CSX Transportation v. Easterwood, supra, the Supreme Court held that a claim of excessive speed, not in violation of the federally set speed limit of 60 mph, would be preempted. The Supreme Court did reference the savings clause of the preemption provision of the FRSA which says "a State may adopt...a more

stringent law, rule, regulation, order, or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard." 45 U.S.C. 434.

There have been several decisions since Easterwood which have examined the term "local safety hazard." Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880 (N.D. Ga. 1993) held that "local safety hazard" did not include conditions covered by 646.214(b)(3), such as multiple tracks and inadequate sight distance. However, Missouri Pacific Railway Company v. Lemon, 861 S.W. 2d 501 (Tex. App. 1993), held exactly the opposite. In that case the engineer was familiar with the crossing and knew that there was a sight obstruction and multiple tracks. The Court held that "his failure to slow the train under

these conditions is evidence he was operating his train at an excessive rate of speed and is a claim that is not preempted by federal law." Missouri Pacific v. Lemon, 861 S.W. 2d at 510.

The gist of the Plaintiffs claim in the case at bar is that this was a crossing that needed signals and gates, that it had been identified by and to the railroad in the diagnostic review before 1989 that the crossing needed signals and gates, and nothing was done until April 1993. Once this assessment was made and the crossing was identified as failing to meet the federal regulations for grade crossing safety, the railroad could not ignore this determination and walk away from its common law duty to maintain a safe crossing. If there were no plans to immediately institute the project to make

the crossing safe by installation of the warning devices, the railroad, under its common law responsibilities, should have instituted interim measures to maintain a safe crossing. One of the ways the crossing could be made safer would be to slow the train speeds. The railroad should have issued a "slow order," and the engineer should have operated the train at a slower speed because of the multiple main line tracks and unusually restricted sight distance. Until gates and signals are actually installed, the public that uses the crossing is protected only by the railroad's exercise of reasonable care at the crossing. Earwood v. Norfolk Southern Railway Company, 845 F. Supp. 880, 886-87 (N.D. Ga. 1993).

III. JEFFREY PRICKETT'S FAILURE TO STOP AT THE STOP SIGN WAS NOT CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW, NOR WAS IT THE PROXIMATE CAUSE OF THIS ACCIDENT.

A. CONTRIBUTORY NEGLIGENCE IS NOT A DEFENSE TO PLAINTIFFS' CLAIMS OF WANTON CONDUCT BY NORFOLK SOUTHERN AND ENGINEER STEPHENS.

If there was a crossing in Alabama which was more dangerous than this one on December 28, 1992, Plaintiffs are not aware of it. Plaintiffs have presented evidence that on the date of the accident, the crossing did not meet federal standards for grade crossing safety, that the railroad had been aware of this failure at least since the diagnostic review performed in 1989, that there had been 13 motor vehicle/train accidents at this crossing since 1984, that even after learning these facts the railroad did not take any interim measures to make the crossing safer, that

the Norfolk Southern was requested by the Calhoun County Commission to blow more than the required amount of whistle at this crossing (C 1314), that even after this request and on the occasion of this accident Engineer Stephens did not blow the train horn as required by law or as necessitated by the circumstances (C 532-33), that Engineer Stephens was familiar with this crossing and had operated trains over it many, many times (C 124), and that even with his knowledge of the facts and circumstances surrounding this crossing, and after seeing two trucks approaching the crossing, Engineer Stephens did not slow or blow his whistle. This is sufficient evidence of wantonness to submit those claims to the jury, and if wantonness is found by the jury, then contributory negligence is not a defense as a matter of law.

In Burlington Northern Railway Company v. Whitt, 575 So. 2d 1011, 1021 (Ala. 1990), the Court held that there was evidence of wantonness when the train approached the crossing at a speed in excess of its company rules, the engineer was familiar with the crossing and did not blow the whistle or brake until shortly before impact, and the electric signals were not working. This Court has also found that there was evidence of wantonness when the train did not have on lights, blow its whistle or apply brakes until after impact, and signals were not working. Hamme v. CSX Transportation, 621 So. 2d 281 Ala. 1993).

> While we recognize a continuing duty on the part of a person intending to cross railroad tracks to stop, look, and listen for approaching trains, if there is substantial evidence that the railroad failed to use all reasonable means to warn the approaching driver of his danger, after the railroad discovered the

> approaching driver's peril, ...then the question of wantonness if for the jury.

Hamme, 621 So. 2d at 283-84.

B. THERE IS DISPUTED EVIDENCE OF CONTRIBUTORY NEGLIGENCE PROXIMATELY CAUSING THIS ACCIDENT.

Jeffrey Prickett was not speeding, he slowed his pickup truck to about 15 mph for the crossing, there was no train whistle warning him of the train's approach, and he probably did not have sight of the train approaching from behind him. Section 32-5A-150 of the Code of Alabama states:

> Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, the driver of such vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of such railroad, and shall not proceed until he can do so safely. The foregoing requirements shall apply when:
>
> 1) A clearly visible electric or mechanical signal device

> gives warning of the immediate approach of a railroad train;
> 2) A crossing gate is lowered or when a human flagman gives or continues to give a signal of the approach or passage of a railroad train;
> 3) A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from such distance and such railroad train, by reason of its speed or nearness to such crossing, is an immediate hazard;
> 4) An approaching railroad train is plainly visible and is in hazardous proximity to such crossing.

The law of Alabama is not that there is an absolute duty to stop, look and listen whenever a driver comes upon a railroad track; it is the law that if a driver approaches a track and has notice that a train is approaching at that time, then he has a duty to stop, look and listen before proceeding.

The Eleventh Circuit, interpreting Alabama law in Stallworth v. Illinois

Central Gulf Railroad, 690 F. 2d 858 (11th Cir. 1982), explained the rule this way:

> We hold that Alabama does not impose an absolute duty to stop, look and listen...
>
> ...
>
> ...As we have said, we do not think that it can justly be affirmed, as a matter of law, that there is a duty to stop in all cases, but we do think that the duty exists in cases where there is an obstruction to sight or hearing, and that where the surroundings are such that but one conclusion can be reasonably drawn - and that conclusion is that it is negligence to proceed without halting - the court should without hesitation direct a verdict, if no halt is made. In the majority of cases, however, the question is one of fact, or a mixed question of law and fact, rather than a pure question of law...
>
> ...The general rule is that a motorist has a duty to stop, look and listen before crossing a railroad track. An exception arises when the evidence is such that some peculiar environment or hazardous condition made the failure to stop not negligent...
>
> ...The exception acknowledged in Lambeth, and illustrated in Callaway, 40 So. 2d 73; Johnston, 199 So. 2d 840; and McCullough, 396

> So. 2d 683, arises when some peculiar environment or hazardous condition confronts the driver. The unusual topography in Callaway, the distracting trees and foliage in Johnson, and the disputed failure of the automatic signal device in McCullough brought the issue of the driver's negligence within the province of the jury.

In this case, because the train did not blow its whistle and was not plainly visible to Jeffrey Prickett, he did not have a duty to stop, look and listen.

Plaintiffs would also submit to this Court that it knows what everyone else knows, and that is that motorists do not stop for railroad tracks, even if there is a stop sign at the tracks. To do merely what other prudent persons do without injury, and what he himself has done on other occasions without injury, is not contributory negligence. Johnson v. Niagara Machinery and Tool Works, 555 So. 2d 88, 94 (Ala. 1989). To prove

contributory negligence as a matter of law, Defendants must show that Jeffrey Prickett knew of the approaching train, appreciated the danger of the circumstances at the moment the incident occurred and placed himself in danger's way. Burlington Northern v. Whitt, 575 So. 2d at 1021. If Jeff Prickett was only "heedless" of the approaching train, this does not rise to the level of contributory negligence. Johnson v. Niagara Machinery, 555 So. 2d at 94.

The issue of contributory negligence in this case, as in most negligence cases, is a jury question and it was inappropriate for the Circuit Court to have granted summary judgment on this basis.

CONCLUSION

WHEREFORE, THE ABOVE PREMISES CONSIDERED, Appellants respectfully

requests this Honorable Court to reverse the judgment and remand the cause.

/s/ Leila H. Watson

APPENDIX D

IN THE SUPREME COURT OF ALABAMA

MICHELLE PRICKETT, et al.,
Appellants,

VS.

NORFOLK SOUTHERN RAILWAY
COMPANY, et al.,
Appellees.

CASE NO. 1940479

APPELLANTS' REQUEST FOR ADDITIONAL
FACTS PURSUANT TO A.R.A.P. RULE 39(k)
and
APPLICATION FOR REHEARING

Leila H. Watson
David Cromwell Johnson
Attorneys for Appellants

[ONLY THE APPELLANTS' REQUEST FOR ADDITIONAL FACTS IS INCLUDED; THE APPLICATION FOR REHEARING IS NOT RECOPIED FOR THIS APPENDIX.]

APPELLANT'S REQUEST FOR ADDITIONAL FACTS PURSUANT TO A.R.A.P. RULE 39(k)

Appellant requests that the Court rehear this case, and include the following facts in its opinion:

1. Jeffrey Prickett was killed when his pickup truck was struck by a Norfolk Southern train at the DeArmanville crossing in Calhoun County. The accident occurred on December 28, 1992.

2. Jeffrey Prickett was driving a red pickup truck south on County Highway 45. As he approaches the DeArmanville crossing, the highway is at an acute angle to the tracks, almost parallel, and then immediately before the crossing, the road makes a sharp right turn and intersects the crossing at a 90 degree angle. (See map; C 480, 535) An eastbound train, like the one involved in

this accident, approaches the crossing from behind southbound highway traffic, or over the right shoulder of a motorist. Mr. Prickett was following a white truck on the highway which crossed the railroad tracks in front of him. Engineer Stephens saw the trucks approaching the crossing when the train was about 500 feet from the crossing. (C 128) Mr. Prickett appeared to be going about 15 mph and Engineer Stephens thought he was going to stop for the crossing. (C 132) When he realized the Prickett truck was not stopping, the train was about 50 feet from the crossing. (C 132) The truck was struck on the passenger side.

Engineer Stephens was operating his train at about 44 mph, eastbound from Birmingham. (C 125, 128) He claims that he started blowing his train horn more than one-quarter mile from the

DeArmanville crossing. (C 127, 135) This testimony is disputed by two people who were in the immediate vicinity of the crossing, who testified that they did not hear a whistle prior to the impact between the train and Jeffrey Prickett's red truck. (C 532-33)

3. Jeffrey Prickett's accident was the 14th accident since 1984, and the ninth since 1988. (C 786-99) The reported accidents were on:

July 7, 1984
September 24, 1985
December 12, 1985
February 1, 1987
January 14, 1988
February 4, 1989
March 17, 1990
April 12, 1990
July 8, 1990
May 25, 1991
September 28, 1991
June 26, 1992
August 13, 1992
December 28, 1992 (Prickett accident)

4. There have been three federal aid projects to upgrade the DeArmanville

crossing.

Project 1: Project Number RRP-000S(12) was completed in 1978/79, and involved the installation of two "no passing zone" signs and two "R X R" pavement markings. (C 172) Federal funds were used to pay for these improvements. (C 422) There was no diagnostic review performed prior to approval of this project by the Federal Highway Administration.

Project 2: Project Number RRP-000S(266) involved the installation of the stop signs and repainting the "R X R" pavement markings and centerline striping on the roadway. (C 259) The project was completed after this accident. (C 593) It is unclear whether the work was completed as a separate project, or as phase one of the project to install flashing signals and gates (Project 3).

(C 1099-1100) Federal funds were used to pay for these improvements. (C 444)

Project 3: Project Number RRP-000S(285) involved the installation of signals, gates, a bell, motion predictor, chevron signs and tree cutting. The construction was completed and the signals were in service in April 1993. Federal funds were used to pay for these improvements. (C 462) A diagnostic review was conducted prior to this project.

The chronology of events pertaining to the three projects is as follows:

4/28/78 Federal Highway Administration (FHWA) approves Project 1 (C 422)

5/18/79 Project 1 is completed. (C 171-72, 1002)

8/7/89 Prior to this date a diagnostic review of the crossing was performed. (C 679, 691) This is the only diagnostic review ever done of this crossing. (C 1077) Following the diagnostic

review, the State sought inclusion of the crossing in the "Rail-Highway Safety Program." (C 740-42) On this date the FHWA gave approval to include the crossing in the Safety Program. (C 679, 779)

5/21/91 Plans for Project 3 are started. These plans include signals, gates, a bell, motion predictor, chevron signs and tree cutting. (C 769)

11/4/91 FHWA approves Project 2. (C 444)

11/13/91 Calhoun County installs stop signs, stop ahead signs, pavement markings and stop bars at the crossing. This is not a federal aid project. (C 1088-89)

6/26/92 Detailed engineering plans for Project 3 are completed. (C 208-22)

10/27/92 This is the "Effective date of authorization" by the FHWA for Project 3. (C 462) The authorization itself was not signed by the FHWA until 12/29/92.

12/28/92 Jeffrey Prickett's accident.

12/29/92 FHWA signs the authorization for Project 3. The effective date of the authorization is back-dated to 10/27/92.

1/8/93 Norfolk Southern orders the material for Project 3. (C 488, 492)

3/24/93 The material for Project 3 is shipped. (C 488, 492)

4/26/93 Project 3 is completed and the improvements are put in service. (C 488)

5. The DeArmanville Crossing has a double main line railroad track, and is protected by crossbucks and a stop sign on either side, and "R X R" pavement markings. The track runs east-west, and on the occasion of the accident, the train was eastbound. County Highway 45 has two lanes. On the north side of the crossing, which is the approach taken by Jeffrey Prickett, the highway approaches the tracks at a very acute angle, and just before the grade crossing, turns into the crossing at a 90 degree angle. (Diagrams at C 480, 535) In this configuration, if highway traffic is

slowing for the crossing, an eastbound train would approach from behind the highway user.

No. 96-1508

Supreme Court, U.S.
FILED
APR 23 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

MICHELLE PRICKETT, BOBBY PRICKETT, and RITA ROBERTSON, as Administrators of the Estate of Jeffrey Prickett, deceased,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENTS' BRIEF IN OPPOSITION

CRAWFORD S. McGIVAREN, JR. *
STEVE A. TUCKER
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
2001 Park Place North
Suite 700, Park Place Tower
Birmingham, Alabama 35203
(205) 716-5200

ROBERT C. DILLON
MERRILL, PORCH, DILLON & FITE, P.A.
500 SouthTrust Bank Building
Anniston, Alabama 36202
(205) 237-2871

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents Norfolk Southern Railway Company and David W. Stephens

* Counsel of Record

April 23, 1997

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18 pp

QUESTION PRESENTED

Whether this Court should review a decision rendered without opinion by the Alabama Supreme Court where there is an adequate and independent state law basis for that decision and where that court decided that the case was not of sufficient precedential value to merit a written opinion.

LIST OF PARTIES AND RULE 29.6 LIST

All of the parties to the proceeding are listed in the caption to the petition.

Pursuant to Rule 29.6 of the Rules of this Court, respondent Norfolk Southern Railway Company is a subsidiary of Norfolk Southern Corporation.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.6 LIST	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS TO DENY THE PETITION	4
I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS AN ADEQUATE AND INDEPENDENT STATE LAW BASIS FOR THE DECISION OF THE ALABAMA SUPREME COURT	5
II. THE PETITION SHOULD BE DENIED BECAUSE, TO THE EXTENT THE DECISION OF THE ALABAMA SUPREME COURT IS BASED ON FEDERAL LAW AT ALL, IT SIMPLY FOLLOWS THE DECISION OF THIS COURT IN *CSX TRANSPORTATION, INC. v. EASTERWOOD*, 507 U.S. 658 (1993)	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Arizona v. Evans, 514 U.S. 1, 115 S. Ct. 1185 (1995) 8

Armijo v. Atchison, Topeka & Santa Fe Ry., 87 F.3d 1188 (10th Cir. 1996) 9

Borden v. CSX Transp., Inc., 843 F. Supp. 1410 (M.D. Ala. 1993) 5, 6, 7

Bowman v. Norfolk Southern Ry., No. 94-1204, 1995 WL 550079 (4th Cir. Sept. 15, 1995) (unpublished decision) 9

CSX Transp., Inc. v. Easterwood, 507 U.S. 658 (1993) 4, 5, 9

Elrod v. Burlington N.R.R., 68 F.3d 241 (8th Cir. 1995) 9

Gibson v. Norfolk Southern Corp., 878 F. Supp. 1455 (N.D. Ala. 1994), *aff'd without opinion*, 48 F.3d 536 (11th Cir. 1995) 7, 9

Hester v. CSX Transp., Inc., 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815 (1996) 9

Hood v. Murray, 547 So. 2d 75 (Ala. 1989) 6

International Longshoremen's Ass'n v. Davis, 476 U.S. 380 (1986) 5

Lambeth v. Gulf, Mobile & Ohio R.R., 141 So. 2d 170 (Ala. 1962) 7

Michigan v. Long, 463 U.S. 1032 (1983) 8

Middaugh v. City of Montgomery, 621 So. 2d 275 (Ala. 1993) 6, 7

National R.R. Passenger Corp. v. H & P, Inc., 949 F. Supp. 1556 (M.D. Ala. 1996) 7, 9

Thirkill v. J. B. Hunt Transport, Inc., 950 F. Supp. 1105 (N.D. Ala. 1996) 9

Watson v. Birmingham So. R.R., 66 So. 2d 903 (Ala. 1953) 7

STATUTES

23 U.S.C. § 409 2

45 U.S.C. § 434, currently codified at 49 U.S.C. § 20106 2

OTHER AUTHORITIES

Alabama Rule of Appellate Procedure 53 ..... 2, 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-1508

MICHELLE PRICKETT, BOBBY PRICKETT, and RITA ROBERTSON, as Administrators of the Estate of Jeffrey Prickett, deceased,

Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY and DAVID W. STEPHENS,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

---

RESPONDENTS' BRIEF IN OPPOSITION

Petitioners in their petition for writ of certiorari seek review by this Court of a decision of an Alabama state court which was based on state law. The decision of the Alabama trial court, affirmed without opinion by the Alabama Supreme Court, stated:

> [A] complete summary judgment is hereby entered in favor of the defendants on all claims of the plaintiffs on the basis that the contributory negligence of the plaintiffs' decedent was the sole proximate cause of the accident and death here in question.

Pet. App. 23. Respondents respectfully request that the Court deny the petition for a writ of certiorari seeking

review of the judgment of the Supreme Court of Alabama entered in this case because the state law ground is the *only* basis that supports the judgment as to *all* claims.

OPINIONS BELOW

The Order and Judgment of the Calhoun County Circuit Court, handed down on November 23, 1994, and entering summary judgment for the respondents, is an unpublished opinion and is included in the petitioners' Appendix at 4-23. The unanimous decision of the Alabama Supreme Court was issued on October 11, 1996, affirming without opinion the decision of the Calhoun County, Alabama, Circuit Court. This affirmance is not reported but is in the petitioners' Appendix at 1-2. On December 13, 1996, the Alabama Supreme Court overruled petitioners' application for rehearing without opinion. Pet. App. 3.

STATEMENT OF JURISDICTION

Respondents respectfully submit that this Court does not have jurisdiction of this case under 28 U.S.C. § 1257(a) because the decision of the Alabama Supreme Court has an adequate and independent state law basis.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Although there are several such provisions (including 45 U.S.C. § 434, currently codified at 49 U.S.C. § 20106, and 23 U.S.C. § 409) that would be involved in review of that portion of the state court decision below which relied on federal law, the only provision which might help to explain the posture of this case and why this petition should be denied is Rule 53 of the Alabama Rules of Appellate Procedure. It is reproduced in the Appendix to this brief at 1a-2a.

STATEMENT OF THE CASE

1. The incident which is the basis of this lawsuit occurred on December 28, 1992, when Jeffrey Prickett, the driver of a pickup truck, drove without stopping past an advance warning sign, a stop ahead sign, painted pavement markings, a railroad crossbuck sign and a regulation stop sign onto a railroad track just as the train was reaching the crossing. (C 130-32, 152, 1113-19). Prickett died in the resulting collision. The personal representatives of the deceased driver are the petitioners in this case. They presented affidavits for the purpose of showing that the train horn had not been sounded as it approached the crossing (as required by Alabama state law). Pet. App. 9; (C 532-33). However, the trial court concluded that, if the driver had stopped as he was required to do under state law, "there is nothing that would have kept him from seeing the approaching train." Pet. App. 10-11.

Petitioners did not contend before the Alabama Supreme Court that Mr. Prickett stopped at the stop sign. Pet. App. 61-65. Instead, they argued that his failure to stop for the regulation stop sign was reasonable and prudent behavior. Pet. App. 64. Both the Alabama trial court and the Alabama Supreme Court rejected petitioners' contention under state law. That holding raises the only question that can be presented in this case.

2. Petitioners filed this suit in Calhoun County, Alabama, Circuit Court, against the railroad company operating the train (respondent Norfolk Southern Railway Company) and the train engineer. Petitioners' claims, brought under Alabama state law, were based on their allegations that the defendants had negligently and/or wantonly operated the train on the date of the accident, and that the railroad was negligent and/or wanton with regard to the adequacy of the traffic control devices present at the crossing on the date in question. (C 2-11). After extensive

fact discovery, the state trial court granted defendants a *complete* summary judgment "on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question." Pet. App. 10, 23.

Although the Alabama state law of contributory negligence provided the only basis completely to resolve the case, the state trial court also went on to rule that two particular claims of the petitioners were preempted by federal law in any event. Granting summary judgment to the defendants *as to those claims,* the state trial court, following this Court's opinion in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), held that any claims based on the speed of the train or on the adequacy of the traffic control devices at the crossing at the time of the accident were preempted Pet. App. 8, 11-23.

The Alabama Supreme Court unanimously affirmed the trial court decision without opinion, citing instead Alabama Rules of Appellate Procedure 53(a)(1) and (a)(2)(E), which provide that "an opinion in the case would serve no significant precedential purpose" and that the summary judgment was "supported by the record." App. 1a. Petitioners seek a writ of certiorari from this nonopinion affirmance of a trial court's decision which was plainly based on state law. The petition should be denied.

REASONS TO DENY THE PETITION

The Alabama Supreme Court affirmed the decision of the Calhoun County Circuit Court which granted respondents complete summary judgment on state law contributory negligence grounds. Pet. App. 8-11, 23. In addition, the trial court granted partial summary judgment as to claims regarding the speed of the train and the adequacy of the signs at the crossing on the basis of federal preemption. Pet. App. 8, 11, 22-23.

As the case was presented on appeal, the Alabama Supreme Court could have affirmed on the basis of state law, or could have affirmed in part and reversed in part by affirming either as to the state law basis for summary judgment or as to the federal preemption basis for partial summary judgment. The Alabama Supreme Court simply affirmed without opinion.

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS AN ADEQUATE AND INDEPENDENT STATE LAW BASIS FOR THE DECISION OF THE ALABAMA SUPREME COURT.

By cases too numerous to cite, it has long been the law that where there is an adequate and independent state law basis for the decision of a state court, this Court lacks jurisdiction to review the case. For example, in *International Longshoremen's Ass'n v. Davis*, 476 U.S. 380, 387 (1986), this Court observed:

> Given the reliance of the Alabama Supreme Court on its procedural rule governing the presentation of affirmative defenses, we first decide whether that rule in this case represents an independent and adequate state ground supporting the judgment below. If it does, our review is at an end, for we have no authority to review state determinations of purely state law. Nor do we review federal issues that can have no effect on the state court's judgment.

In this case, the decision of the Alabama court at issue is supported by the adequate and independent state law ground that the petitioners' decedent's contributory negligence in failing to stop for the stop sign at the crossing was the sole proximate cause of the accident.

The Alabama Supreme Court did not write an opinion explaining its affirmance of the trial court. However, the court did cite the cases of *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), and *Borden v. CSX Transportation, Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993), in affirming the trial court. To understand the

court's citation of these cases, it is necessary to look at the opinion of the trial court.

The Calhoun County Circuit Court cited *Borden* as support for granting respondents summary judgment based on the state law ground of contributory negligence. The court stated:

> [T]he plaintiffs have not submitted any evidence controverting testimony submitted by defendants that plaintiffs' decedent never stopped for the stop sign at the crossing. Whether the horn was sounded properly is immaterial and irrelevant on this issue. As plaintiffs' decedent was under an obligation under Alabama law to stop, look and listen in obedience to the stop sign at the crossing, and the undisputed evidence is that he failed to do so, defendants' Motion for Summary Judgment is granted on the basis that no reasonable juror could find that the driver's contributory negligence was not the sole proximate cause of the accident and death here in question. *Middaugh v. City of Montgomery*, 621 So. 2d 275 (Ala. 1993), and *Borden v. CSX Transp., Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993).

Pet. App. 9-11.

All of this discussion is plainly based on well-established state law. The proposition that the motorist is "held to have seen that which was there to be seen" is clearly a matter of state law. *Hood v. Murray*, 547 So. 2d 75, 78 (Ala. 1989) (affirming a directed verdict against a motorist on a negligence claim where the evidence established that the other vehicle in the accident at issue "was close enough to constitute an immediate hazard and could have been discovered by [the motorist] in time to avoid injury"). The trial court in this case proceeded to grant respondents summary judgment as to all of petitioners' claims on the basis that the contributory negligence of their decedent in failing to stop for the stop sign at the railroad grade crossing "was the sole proximate cause of the accident and death here in question." Pet. App. 23.

This judgment is clearly supported by repeated Alabama precedent. *See Middaugh v. City of Montgomery*, 621 So. 2d 275 (Ala. 1993) (granting defendants summary judgment on the basis that the negligence of the driver of the vehicle was the sole proximate cause of the accident); *Lambeth v. Gulf, Mobile & Ohio R.R.*, 141 So. 2d 170 (Ala. 1962) (affirming a directed verdict for the railroad where the plaintiff motorist's view of the crossing and train at issue was not obstructed); *Watson v. Birmingham So. R.R.*, 66 So. 2d 903 (Ala. 1953) (affirming a directed verdict for the railroad where there was nothing to obstruct the plaintiff motorist's view of the crossing and train); *National R.R. Passenger Corp. v. H & P, Inc.*, 949 F. Supp. 1556 (M.D. Ala. 1996) (granting railroad's motion for summary judgment under Alabama law as to the negligence of the driver of a tractor trailer truck involved in a collision with an Amtrak train and citing numerous Alabama cases regarding motorists' duty at railroad grade crossing intersections); *Gibson v. Norfolk Southern Corp.*, 878 F. Supp. 1455 (N.D. Ala. 1994), *aff'd without opinion*, 48 F.3d 536 (11th Cir. 1995) (granting summary judgment for the railroad under Alabama law where the evidence established that the motorist's view of the automatic flashing lights at the crossing was unobstructed); *Borden v. CSX Transp., Inc.*, 843 F. Supp. 1410 (M.D. Ala. 1993) (ruling that under Alabama law, the contributory negligence of plaintiff's decedent was the sole proximate cause of the collision with a train). These cases fully explain the decision of the Alabama Supreme Court to affirm without opinion.

It cannot be disputed that the trial court decision, affirmed without opinion by the Alabama Supreme Court, granted respondents summary judgment on alternative grounds. One ground was state law; the other ground was federal law. This is clearly stated in the opinion of the trial court, which is the only opinion available for this Court to consider. As a result, the decision of the Ala-

bama courts has a clearly stated adequate and independent state law basis. Accordingly, the petition for certiorari should be denied.

Moreover, the state law ground is actually the *only* ground that supports the complete summary judgment in this case. If the trial court's opinion had been based simply on federal law, without a discussion of the effect of the petitioners' decedent's failing to stop for the stop sign, there would have been a trial at which a jury would have been asked to resolve whether the train horn was properly sounded before the accident, whether the train crew kept a proper lookout, and the issue of subsequent negligence following the train crew's discovery of the petitioners' decedent in a position of peril (none of these claims was subject to any argument that they were pre-empted by federal law).

The cases of *Michigan v. Long*, 463 U.S. 1032 (1983), and *Arizona v. Evans*, 514 U.S. 1, 115 S. Ct. 1185 (1995), cited by petitioners, do not indicate a different result. The holdings of the state courts involved in *Michigan v. Long* and *Arizona v. Evans* appeared to be based squarely on federal law because the federal and state constitutional provisions were identical. Here, by contrast, in the only opinion available to this Court for review, the trial court granted complete summary judgment based solely on state law. The alternative (partial) summary judgment which was based on federal law would have only removed two claims from the case: any claim based on the speed of the train and any claim based on the adequacy of the signs at the crossing. Because the decisions below were plainly and expressly based on an adequate and independent state law ground, the presumption toward jurisdiction expressed in *Michigan v. Long* does not and should not apply.

II. THE PETITION SHOULD BE DENIED BECAUSE, TO THE EXTENT THE DECISION OF THE ALABAMA SUPREME COURT IS BASED ON FEDERAL LAW AT ALL, IT SIMPLY FOLLOWS THE DECISION OF THIS COURT IN *CSX TRANSPORTATION, INC. v. EASTERWOOD*, 507 U.S. 658 (1993).

While the opinion of the trial court makes it unmistakably clear that the Alabama Supreme Court's "no opinion" decision affirming the trial court in this case has an adequate and independent state law ground, that part of the decision of the Alabama court was also correct on a federal basis, because it simply followed the decision of this Court in *Easterwood*. Of course, as to its holding regarding preemption of state law claims based on the speed of the train, the decision simply follows this Court's holding in *Easterwood*. This ruling on federal law by the Alabama court is consistent with the well-established body of lower court cases that also have followed *Easterwood* on this point. Although the post-*Easterwood* cases that are consistent with the Alabama court on the issue of train speed are too numerous to cite, examples include *Bowman v. Norfolk Southern Railway*, No. 94-1204, 1995 WL 550079 (4th Cir. Sept. 15, 1995) (unpublished decision); *Gibson v. Norfolk Southern Corp.*, 878 F. Supp. 1455 (N.D. Ala. 1994), *aff'd without opinion*, 48 F.3d 536 (11th Cir. 1995); *National Railroad Passenger Corp. v. H & P, Inc.*, 949 F. Supp. 1556 (M.D. Ala. 1996); and *Thirkill v. J. B. Hunt Transport, Inc.*, 950 F. Supp. 1105 (N.D. Ala. 1996).

As to its holding regarding preemption of state law claims based on the adequacy of the traffic control devices at the crossing, the Alabama court's decision in this case is consistent with the decisions of three courts of appeals, including *Armijo v. Atchison, Topeka & Santa Fe Railway*, 87 F.3d 1188 (10th Cir. 1996); *Elrod v. Burlington Northern Railroad*, 68 F.3d 241 (8th Cir. 1995); and *Hester v. CSX Transportation, Inc.*, 61 F.3d 382 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 815

(1996), all of which also followed this Court's *Easterwood* decision on this issue. Thus, granting the petition for certiorari in this case would be solely to provide an advisory opinion in a situation where the state court has simply declared that it is following the precedent of this Court as expressly declared by this Court and as subsequently explained by the federal courts of appeal. Obviously no useful purpose would be served by such an effort by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

CRAWFORD S. MCGIVAREN, JR. *
STEVE A. TUCKER
CABANISS, JOHNSTON, GARDNER, DUMAS & O'NEAL
2001 Park Place North
Suite 700, Park Place Tower
Birmingham, Alabama 35203
(205) 716-5200

ROBERT C. DILLON
MERRILL, PORCH, DILLON & FITE, P.A.
500 SouthTrust Bank Building
Anniston, Alabama 36202
(205) 237-2871

CARTER G. PHILLIPS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents
Norfolk Southern Railway Company
and David W. Stephens

April 23, 1997

* Counsel of Record

APPENDIX

APPENDIX

APPENDIX

"OPINIONS AND 'NO OPINION' CASES OF THE SUPREME COURT AND THE COURT OF CIVIL APPEALS":

(a) Affirmance Without Opinion. The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:

(1) That an opinion in the case would serve no significant precedential purpose; and

(2) That one of the following circumstances exists:

(A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

(B) The evidence adequately supports the jury verdict on which the judgment or order is based;

(C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;

(D) The order of an administrative agency is sufficiently supported by the evidence in the record;

(E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or

(F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

(b) Designation of Category. When the Supreme Court or the Court of Civil Appeals affirms a judg-

ment without an opinion, it shall in its order of affirmance designate the case as a "No Opinion" case and in its order of affirmance it shall also cite section (a)(1) of this rule and that subpart of section (a)(2) relied upon by the court in its decision to write no opinion.

(c) Publication of Decisions. The reporter of decisions shall publish all opinions of the Supreme Court and the Court of Civil Appeals in the official reports of Alabama decisions, but the text of an order of affirmance in a "No Opinion" case shall not be published in the official reports. The "No Opinion" cases of each court shall be collected in a periodic "Table of Decisions Without Published Opinions," which shall be published in the official reports and which shall indicate the action taken in all "No Opinion" cases. However, if in a "No Opinion" case a Justice or Judge writes a special opinion, either concurring with or dissenting from the action of the court, the reporter of decisions shall publish that special opinion, along with a statement indicating the action to which the special opinion is addressed.

(d) Unpublished Decisions Not Precedent. Orders of judgments of the Supreme Court and the Court of Civil Appeals not published in the official reports have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrines of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar.

(e) Time of Publication. An opinion of the Supreme Court shall not be published while an application for rehearing is pending, and an opinion of the Court of Civil Appeals shall not be published while an application for rehearing is pending or while a petition for certiorari review is pending in the Supreme Court. However, the delay in publication caused by this provision shall not affect the precedential value of an opinion.